91-1123

No. _____

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

CHARLES F. RIVES, II,
Marv A. Seurer; Ronald D. Pester,
Tom Hampleman; R.D. Griffin;
John A. Cameron; Marv Slusser;
and Gene Dudley,
Petitioners,
v.
INTERSTATE COMMERCE COMMISSION,
United States of America,
Respondents.

UNION PACIFIC MOTOR FREIGHT COMPANY,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Of Counsel:

M.J. Ogborn
Harding & Ogborn
1200 17th Street
Denver, CO 80202
(303) 629-0300

A.M. Lewandowski*
Dysart Taylor
4420 Madison Ave.
Kansas City, MO
(816) 931-2700

Attorneys for Petitioners
*Counsel of Record

DATE: November 15, 1991

QUESTIONS PRESENTED

1. Whether in a railroad consolidation the employees of a wholly-owned motor carrier subsidiary limited to "auxiliary to and supplemental of" to rail service are within the class of employees entitled to mandatory labor protective conditions under 49 U.S.C. §11347?

2. Whether the nature of the work performed and not simply the identity of the employer is the determining component of entitlement to mandatory labor protective conditions under 49 U.S.C. §11347?

3. Whether the precedent establishing mandatory labor protective conditions for employees of wholly-owned motor carrier subsidiaries in a railroad consol--idation is the proper interpretation of 49 U.S.C. §11347 or

whether the decision of the U.S. Court of Appeals for the Tenth Circuit in the Interstate Commerce Commission denying mandatory labor protection in this case is the proper interpretation of that statute?

4. Whether the determination of the nature of the work performed is an unnecessary and undesirable role for the Commission?

5. Whether 49 U.S.C. §11347 is sufficiently ambiguous to warrant an unqualified affirmation of the Commission action under Chevron U.S.A., Inc. v. Natural Resources Defense Council.

6. Whether the U.S. Court of Appeals erred in declining review of the employees' entitlement to a discretionary labor protection by affirming the Interstate Commerce

Commission's refusal to award discretionary benefits?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are former employees of the Union Pacific Motor Freight Company ("UPMF")[1/], a wholly-owned subsidiary of the Union Pacific Railroad Company ("UP").

Petitioners:	Charles F. Rives, II Marv A. Seurer Ronald D. Pester Tom Hampleman R.D. Griffin John A. Cameron Marv Slusser Gene Dudley
Respondents:	Interstate Commerce Commission United States of America
Intervenor:	Union Pacific Motor Freight Company

[1/] Petitioners believe UPMF is but one segment of a large group of companies. The specific identify of those other corporations or entities is unknown.

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PRIOR OR RELATED APPEALS

This proceeding arises from a decision of the Interstate Commerce Commission: Union Pacific--Control--Missouri Pacific; Western Pacific, 366 I.C.C. 462 (1982), affirmed in Southern Pacific Transportation Co. v. ICC, 736 F.2d 708 (D.C.Cir. 1984), cert. denied, 469 U.S. 1208 (1985).

This proceeding was before the United States Courts of Appeal for the Eighth and Tenth Circuits under the following designations:

Creiger, et al. v. ICC,
Case No. 87-1723
(8th Cir. docketed June 3, 1987)

Rives v. ICC, No. 88-2957
(10th Cir. docketed June 3, 1987)

Seurer, et al. v. ICC,
Case No. 87-2037
(10th Cir. docketed June 19, 1987)

Seurer, et al. v. ICC, No. 88-2956
(10th Cir. docketed June 19, 1987)

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INTERSTATE COMMERCE COMMISSION,
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Respondents.

UNION PACIFIC MOTOR FREIGHT COMPANY,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 6, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 934 F.2d 1171 (10th Cir. 1991) and appears in the Appendix commencing at page 1a.

The April 3, 1987 Decision and April 12, 1989 Reopened Decision opinions of the Interstate Commerce Commission, which have not been reported, appear in the Appendix commencing at 18a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Tenth Circuit was

entered on June 6, 1991. A timely Petition for Rehearing and suggestions for rehearing en banc was denied August 20, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1)(1988).

STATUTES INVOLVED

Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. §5(2)(f) (1976), is set forth in the Appendix at 72a. That section has been recodified at 49 U.S.C. §11347 (1982). Section 11347 is set forth in the Appendix at 56a.

Section 5(2)(c) of the Interstate Commerce Act, 49 U.S.C. §5(2)(c) (1976) is set forth in the Appendix at 71a. That section has been recodified, in pertinent part, at 49 U.S.C. §11344(b)(2)-(c) (1982). Section 11344(b)(2)-(c) is set forth in the Appendix at 51a.

STATEMENT OF THE CASE

A. NEW YORK DOCK LABOR PROTECTIVE CONDITIONS--GENERALLY

It has long been recognized that the consolidation or merger of carriers subject to the jurisdiction of the Interstate Commerce Act could have a "devastating effect[]" on the employees of those carriers.[2/] Congress enacted The Transportation Act of 1940 requiring the protection of employees affected by a merger or consolidation of Class I railroads. That law was entitled 49 U.S.C. §5(2)(f) and was subsequently recodified as 49 U.S.C. §11347. This Court has addressed the importance of labor protective conditions on more than one

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2/ New York Dock Railway v. United States, 609 F.2d 83, 86 (2d Cir. 1979).

occasion.[3] See also Nemitz v. Norfolk & Western Railway Company, 404 U.S. 37 (1971).

Over the years the ICC moulded and refined the labor protective conditions. The most recent vintage is the so-called "New York Dock Conditions" which provide for dismissal, displacement, fringe benefits and moving allowances.[4] Pursuant to 49 U.S.C. §11347, labor protective conditions are a mandatory aspect for approving a con-

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[3] Railway Labor Executives' Association v. United States, 339 U.S. 142 (1950), discusses the origination of employee protective conditions in the Washington Job Protection Agreement of 1936 which was a voluntary arrangement between railroads and their labor unions and was designed to limit labor strife during railroad mergers.

[4] New York Dock Railway--Control--Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979), aff'd sub nom New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979).

solidation or merger of two Class I railroads. Those conditions were required to be "no less protective of the interest of employees than those heretofore imposed".[5/] The Appendix to the New York Dock case setting forth the level of protection is found commencing at Appendix 57a. During the re-codification process, the language of former §5(2)(f) referring to "railroad employees" was deleted and in its place the term "employees" was inserted in new §11347 for clarity.[6/]

[5/] Pub. L. No. 94-210, ¶402(a), 90 Stat. 31 (1976), amending 49 U.S.C. §5(2)(f). Under this amendment the level of protection was required to be no less favorable than the conditions previously imposed.

[6/] H.R.Rep.No. 95-1395, 95th Cong., 2d Sess. 166 (1978).

B. STATUTORY AUTHORITY FOR LABOR PROTECTIONS

1. Mandatory Labor Benefits

Mandatory labor protection is afforded to "employees affected by" a railroad consolidation under 49 U.S.C. §11347 (1982), which is reproduced in the Appendix at 56a. Prior to the re-codification of this section, 49 U.S.C. §5(2)(f) governed these benefits and required the Commission to consider the effect of a consolidation on "the interests of the railroad employees affected". Appendix at 71a. The language change between the old Section 5(2)(f) "railroad employees" and new Section 11347 "employees" was made "for clarity".[7/]

[7/] H.R.Rep.No. 95-1395, 95th Cong., 2d Sess. 166 (1978).

2. Discretionary Labor Benefits

Discretionary labor protection is codified at 49 U.S.C. 11344(b)(2)(C) (1982) and is reproduced in the Appendix at 51a to 55a. The Commission is afforded discretion to fashion protective conditions whenever consistent with the public interest.

C. **HISTORY OF THE CASE**

This case concerns the granting of labor protective conditions in a major rail consolidation, the unification of the Union Pacific Railroad Company ("UP"), the Missouri Pacific Railroad Company ("MP") and the Western Pacific Railroad Company ("WP"). In 1982 the ICC approved this consolidation in a proceeding entitled Union Pacific Corporation, Pacific Rail

System, Inc., and Union Pacific Railroad Company--Control--Missouri Pacific Corporation and Missouri Pacific Railroad Company, Gary W. McPherson v. Union Pacific Motor Freight Co., et al, Finance Docket No. MC-30,000. Prior to this consolidation, there were two wholly-owned motor carrier subsidiaries operated by the UP and MP, namely Union Pacific Motor Freight ("UPMF") and Missouri Pacific Truck Line ("MPTL"). UPMF held a Certificate of Public Convenience and Necessity from the ICC authorizing it to perform trucking services but limiting the authority to auxilliary to or supplemental of UP rail service. Included in the application for consolidation, authority was sought to acquire joint control over UPMF and MPTL in Docket

No. MC-F-14449. The motor carrier aspects and the rail aspects of the entire transaction were consolidated by the ICC. In its Order approving the consolidation, the ICC ordered the standard level of New York Dock labor protective benefits.

This case arose when the Petitioners lost their employment with UPMF following the consolidation. The Petitioner, who had been employed by UPMF from twelve to twenty-five years and who performed ramping and deramping functions on TOFC (trailers on flat cars) and COFC (containers on flat cars) rail shipments, believed they were entitled to labor protection under the New York Dock Conditions. The ICC reopened the proceeding at the request of the Petitioners but determined the Petitioners were not

entitled to the New York Dock Condition benefits because they were employees of the wholly-owned subsidiary, UPMF, rather than technical employees of the railroad.[8/]

At this point it is necessary to digress. Initially there were seven (7) claimants who worked at the UPMF facility in Kansas City; seven (7) claimants who worked at the UPMF facility in Denver; and an unrelated claimant, Gary W. McPherson (who is not involved in this Petition) who sought benefits. In the early post-consolidation proceeding before the ICC, the seven Denver Petitioners and Mr. McPherson were not represented by present counsel. Subsequently, the seven

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[8/] Union Pacific Corp., et al. v. Union Pac. Motor Freight Co., et al., Finance Docket No. MC-30,000 (served April 27, 1987).

Denver claimants employed present counsel. Following the initial denial by the ICC, the seven Kansas City claimants filed a Petition for Review with the United States Court of Appeals for the Eight Circuit in Creiger v. I.C.C., No. 87-1723 and the seven Denver claimants filed a Petition for Review before the United States Court of Appeals for the Tenth Circuit in Seurer v. I.C.C., No. 87-2037. Because the Eighth Circuit proceeding was first-filed, both appeals were consolidated and transferred to the Eighth Circuit.

Before the issues were briefed in the Eighth Circuit, UPMF requested the ICC reopen the proceeding and requested the Eighth Circuit to defer the consolidated Petition for Review until the ICC

acted. On August 17, 1987, the ICC issued a Decision reopening the proceeding and requiring additional evidence and briefs to consider whether UPMF employees had sufficient notice of consequences of the consolidation and the labor protection they might receive.

While awaiting a decision from the ICC, six of the original Petitioners in Creiger entered a Settlement Agreement with UP and withdrew their Petition for Review. Thereafter, on the request of the ICC and UPMF, the Eighth Circuit referred the matter back to the Tenth Circuit based on the residency of the eight remaining Petitioners, i.e., Kansas and Colorado. The Tenth Circuit renumbered the two Petitions for Review as Seurer, et al. v. ICC, No. 88-2956 and Rives v.

I.C.C., No. 88-2957. Undersigned counsel references the settlement simply for the purpose of explaining how the various Petitions for Review were transferred from one Circuit to the other.

Finally, by Decision dated April 12, 1989, the ICC issued its ruling on the reopened proceeding (hereinafter the "Decision").[9/] In the reopened proceeding, the ICC again denied benefits to the Petitioners in a three to two Decision. In that split decision, Vice Chairman Simmons dissented forcefully concerning the majority's disregard for controlling legal precedent, stating: "[T]he Commission must take into account the

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9/ Union Pacific Corp, et al. v. Union Pac. Motor Freight Co., et al., Finance Docket No. 30,000 (served (April 20, 1989), set forth in the Appendix at 36a to 50a.

Cosby decision and not simply shrug it off. While we may view that decision as inconsistent with prevailing Commission precedent, it is ... controlling and binding until otherwise reversed by the courts or legislation." [10/] (emphasis added).

In addition, Commissioner Lamboley stated in dissent: "the majority's position runs contrary to statute and precedent. Nothing in the legislative history limits or precludes eligibility for protections of persons employed by motor carriers providing services substantially integrated with and directly beneficial to the rail carrier...".[11/]

[10/] ICC Decision, April 20, 1989, p.4, set forth commencing at Appendix p. 36a.

[11/] Id.

The Petitioners then sought review before the United States Court of Appeals for the Tenth Circuit, from which this case arises. That Court of Appeals affirmed the Decision of the ICC primarily based upon this Court's interpretation of administrative law in Chevron.[12/] In so doing, it found the intent of Congress was not clear and, therefore, the administrative agency could interpret the statute as it deemed desirable. The Petitioners submit the Court of Appeals for the Tenth Circuit erred in several respects and most particularly in not following the precedent enunciated by its sister court, the United States Court of Appeals for the Eighth Circuit in a

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12/ Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

virtually identical case. Consequently, this Petition for Writ of Certiorari is being filed.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE U.S. COURT OF APPEALS HAS CREATED A CONFLICT WITH A PREVIOUS DECISION OF THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT WHICH SHOULD BE RESOLVED BY THIS COURT.

A. THE EIGHTH CIRCUIT PREVIOUSLY RULED IN COSBY V. I.C.C., 741 F.2d 1077 (1984), cert. denied 471 U.S. 1110 (1985), THAT EMPLOYEES OF A WHOLLY-OWNED MOTOR CARRIER SUBSIDIARY OF A RAILROAD WHICH WAS LIMITED BY THE ICC TO PERFORM SERVICES IN AUXILIARY OR SUPPLEMENTAL RAIL SERVICE WERE ENTITLED TO LABOR PROTECTIVE CONDITIONS.

The first and foremost reason for granting this Petition is to resolve the obvious conflict between the opinion of the Court of Appeals for the Tenth Circuit with a previous decision of the Court of Appeals for the Eighth Circuit.[13/] The facts in this case are virtually

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13/ Cosby v. I.C.C., 741 F.2d 1077 (8th Cir. 1984), cert. denied 471 U.S. 1110 (1985).

identical to the facts in Cosby. In Cosby the Burlington Northern Railroad Company ("BN") consolidated with the St. Louis-San Francisco Railway Company ("Frisco"). Both BN and Frisco operated a wholly-owned motor carrier subsidiary. The ICC approved the consolidation as well as the control of the motor carriers and in so doing, conditioned the approval on the issuance of labor protection as required by 49 U.S.C. §11347 through the standard New York Dock Conditions. Following the consolidation, employees of the wholly-owned motor carrier subsidiary of Frisco were laid off and they sought benefits under the New York Dock Conditions. Those benefits were denied by BN and the denial was initially approved by the ICC for the stated reason that employees of

a subsidiary were not in the intended class to be protected under the statute. An appeal was taken in the United States Court of Appeals for the Eighth Circuit which reversed the Decisicn of the ICC and held that the employees of a motor carrier subsidiary were covered by the protective conditions. Pivotal to that case and also present herein was the fact the operating authority of the wholly-owned motor carrier subsidiary in Cosby was limited by the ICC to auxiliary to or supplemental of rail service transportation. The facts herein are almost identical. If there is a difference, the facts gravitate to higher protection rather than lower protection inasmuch as the individual claimants herein worked

with TOFC and COFC shipments which were transported by rail.[14/]

Notwithstanding the interpretation of the statute by the Court in Cosby, the majority for the ICC steadfastly refused benefits to the employees in this proceeding for the same reason the claimants in Cosby were initially denied, namely that the employees of a wholly-owned motor carrier subsidiary were not entitled to the protective benefits even though the scope of their work was limited to auxiliary to and supplemental of rail service. The Court of Appeals for the Tenth Circuit affirmed that decision under the Chevron doctrine which creates the obvious conflict between the Circuits.

[14/] Again, TOFC refers to trailers on flat cars and COFC refers to containers on flat cars.

In ignoring the precedential value of the Cosby decision, the Court of Appeals and the ICC have also ignored the historic differentiation between railroads and truck lines impcsed by the ICC. Decades ago it was decided that the National Transportation Policy was best served by having a strong truck industry and a strong rail industry to permit the shipping and consuming public an alternative choice of transportation modes and to provide for the national defense in the event of an emergency. To achieve the goals of the National Transportation Policy, Congress and the ICC greatly limited the ability of railroads to own or operate trucking companies. In balancing the needs of the two industries, railroads were permitted to own and

operate wholly-owned subsidiary truck lines with certain strict limitations. That history was best announced by this Court in U.S. v. Rock Island Motor Transit Co.[15] Therein, the Court found that a railroad's operation of a motor carrier was prohibited by the Motor Carrier Act of 1935[16] and the Interstate Commerce Act[17] of 1940 unless the motor carrier service would be auxiliary to or supplemental of rail service.[18] Although the prohibition has been somewhat eroded, the law in effect at the time of the consolidation still limited a railroad's motor carrier operation to auxiliary to or

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[15] 340 U.S. 419, 430 (1951).

[16] 49 Stat. 543.

[17] 54 Stat. 899.

[18] Id. at 432.

supplemental of rail service unless special circumstances were shown.[19/]

Further, the ICC has a long-standing policy of considering a rail carrier and its subsidiaries as a single transportation system. The Cosby Court correctly referred to the single system doctrine when it stated:

> The Commission has "long considered that a carrier and its subsidiaries constitute a single transportation system with respect to transactions under Section 5 of the Act. "Pennsylvania Railroad Co.--Merger--New York Central R.Co., 347 I.C.C. 536, 546 (1974) (citing Louisville & J.B.& R.Co.--Merger, 290 I.C.C. 725, 733; 295 I.C.C. 11; Woods Industries, Inc.--Control--United Transports, Inc., 85 M.C.C. 672, 675). As the Commission noted in Pennsylvania Railroad, "the parent, by reason of ownership, has the legal

[19/] 49 U.S.C. §10922; American Trucking Associations, Inc. v. U.S., 425 F.Supp. 903 (D.D.C. 1975), aff'd 425 U.S. 955 (1976).

> right to direct the affairs of the subsidiaries and the latter have no alternative but to accept this direction, even if such were to result...in complete abandonment of the subsidiaries' operations or the extinction of their corporate existence". (Citation omitted).

Cosby, et al. v. I.C.C., 741 F.2d 1071, 1080 (1984). As previously stated, the Decision of the ICC in this matter was divided on a three to two vote. Vice Chairman Simmons noted in his dissent that the ICC has previously declared that railroad affiliated motor carrier operations involving TOFC and COFC services are "related to a rail carrier" in the ICC proceeding entitled "Improvement of TOFC/COFC Regulations, Railroad-Affiliated Motor Carriers and Other Motor

Carriers".[20] Vice Chairman Simmons further noted in his dissent that in order to adopt that policy, the ICC first made the determination that the type of transportation provided by the motor carrier affiliated is "related to a rail carrier" under 49 U.S.C. §10505. In a separate dissenting opinion, Commissioner Lamboley noted that the record indicates that UPMF was intimately and significantly tied to the railroad's main service functions as an integral part of the overall transportation system and cited instances where the ICC exempted the merger of motor carriers respectively owned by merging rail carriers based on the obvious significant nexus of activity between the integrated motor carrier

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[20] 3 I.C.C.2d 869 (1987).

subsidiaries and the merged rail carriers.

It is obvious the ICC has adopted a "Monday-Tuesday" approach. On the one hand, it considers wholly-owned motor carrier subsidiaries of a railroad as a part of a single transportation system for its regulatory purposes but, on the other hand, when it comes to the payment of protective benefits, the majority believes the companies are entirely separate and, therefore, the protective conditions are not due the employees.

B. THE COURT OF APPEALS ERRED IN ITS RELIANCE ON KANSAS CITY SOUTHERN INDUSTRIES, INC. V. I.C.C., 902 F.2d 423 (5th Cir. 1990), WHICH IS CLEARLY FACTUALLY DISTINGUISHABLE FROM THE FACTS IN THIS CASE.

The Court of Appeals for the Tenth Circuit seemingly indicates a

conflict existed between the Circuits prior to this case. It cites Cosby for one viewpoint and Kansas City Southern Industries, Inc. v. I.C.C.[21/] for a different viewpoint. The facts in Cosby and the Kansas City Southern cases are clearly distinguishable. In Kansas City Southern the motor carrier subsidiary was **not** limited to auxiliary to or supplemental of rail service by the ICC. Further, the work of the motor carrier subsidiary employees appears not to be intimately tied to rail transportation. In this case, the Petitioners operated machinery known as a piggy packer which was utilized to onload and offload containers and trailers from railroad flatcars, ramped and deramped trailers from

[21/] 902 F.2d 423 (5th Cir. 1990).

railroad flatcars and hostled the trailers around the rail yard. Commissioner Lamboley was correct in his dissent that the work of the Petitioners was intimately tied with rail work. Unfortunately, neither the majority of the ICC nor the Court of Appeals chose to consider those facts. Rather, the ICC majority found the determination of the nature of the work was an "unnecessary and undesirable role" for the ICC.

C. THE COURT OF APPEALS' HOLDING HAS CONFLICTING IMPLICATIONS FOR THE TRANSPORTATION INDUSTRY.

The Circuit Decisions have conflicting implications for the transportation industry as the precedent in the Eighth Circuit is that employees of a motor carrier subsidiary of a railroad in a merger

transaction are required to be afforded mandatory labor protection but employees of a motor carrier subsidiary of a railroad in a merger transaction in the Tenth Circuit are not entitled to mandatory labor protective conditions and in addition, it appears may not even be entitled to discretionary labor protective conditions.

The ICC appears to have decided to provide labor protective benefits to only those railroad workers who received paychecks directly from a railroad. The Federal Court precedent is that employees of railroad motor carrier subsidiaries <u>are</u> entitled to labor benefits. Railroads and their motor carrier subsidiaries are faced with an impossible situation with these conflicting precedents when plan-

ning merger and consolidation transactions. In recent years, the railroad industry has succumbed to numerous mergers. Since 1980 deregulation of the transportation industry under the Motor Carrier Act of 1980[22/] and the Staggers Rail Act of 1980[23/] barriers to railroad acquisition of motor carriers have been eliminated. Significant merger and acquisition activity will result. By sending conflicting signals the Tenth Circuit, Eighth Circuit and ICC have undermined national decision-making in the calculation of merger and acquisition costs. The Tenth Circuit's failure to follow on-point precedent and resolve the conflict between

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[22/] Pub.L.No. 96-296, 94 Stat. 793 (1980).

[23/] Pub.L.No. 96-448, 94 Stat. 1897 (1980).

federal agency decision-making and federal court precedent clearly requires prompt correction.

II. THE COURT OF APPEALS' RELIANCE ON THE ANALYSIS OF CHEVRON U.S.A., INC. V. NATURAL RESOURCES DEFENSE COUNCIL IS MISPLACED BECAUSE 49 U.S.C. §11347 IS NOT AMBIGUOUS. THE COURT, THEREFORE ERRED IN AFFIRMING THE DECISION OF THE ICC WHICH CONFLICTS WITH PREVIOUS COURT PRECEDENT.

The Court of Appeals' principal reason for denying relief to the Petitioners and affirming the ICC was based upon Chevron.[24/] The panel's reliance on Chevron is inappropriate in this instance. The statute, 49 U.S.C. §11347, is unambiguous in mandating merger protective benefits for the "carrier" employees. The opposition will argue as before that the recodification of the Interstate

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[24/] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

Commerce Act which modified the statute from railroad employees to carrier employees was not intended to be substantive. The Cosby Court addressed that issue but found it was not necessary to make a ruling concerning the substantive differentiation because the work performed by the motor carrier subsidiary employees for a company that was limited to auxiliary to and supplemental of rail service were, in fact, railroad employees. Petitioners submit that analysis was correct. The deletion of the word "railroad" and insertion of the word "carrier" employees was simply a clarification of the original Congressional intent. The Petitioners herein were performing railroad transportation work albeit through a wholly-owned subsidiary. They were

employees of a carrier regulated by the ICC and, therefore, fall squarely within the protected class under 49 U.S.C. §11347.

The Chevron case does not stand for the proposition that an agency decision should automatically be affirmed. If this Court had intended that result, it would not have overturned the action of the ICC in what many consider to be a well thought out and morally correct policy concerning undercharge cases filed by bankrupt carriers or their collection agents as the Court did in Maislin Industries U.S. v. Primary Steel.[25/]

The Decision of the majority of the ICC pays tribute to form over substance. Simply because there

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25/ ____ U.S. ____, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990).

were historical limitations imposed by the ICC on the operation of trucks by railroads, wholly-owned subsidiaries were formed. Even though the men and women who work for the wholly-owned subsidiaries were carrier employees and performed rail transportation functions, the majority of the ICC has determined they are not entitled to the same level of protection as other railroad employees because they were technically employees of a motor carrier subsidiary.

It is submitted the Chevron criteria does not stand for the proposition that any decision from an administrative agency will be automatically affirmed. While a reviewing court should uphold a defensable construction of an agency's enabling act, it must not

rubber stamp a decision inconsistent with a statutory mandate. The history as well as the court precedent concerning labor protective conditions in the consolidation of rail carriers is well established. The determination by the ICC in this case that individuals who are carrier em-ployees who perform rail work are not entitled to labor protective benefits because they happen to be technically employees of a subsidiary corporation is not proper and the Court of Appeals' opinion that this Court's Chevron analysis requires an affirmation of that ICC Decision should be reversed.

III. THE COURT OF APPEALS' HOLDING THAT THESE EMPLOYEES WERE NOT ENTITLED TO REVIEW OF THE INTERSTATE COMMERCE COMMISSION'S REFUSAL TO EXERCISE ITS DISCRETION TO AWARD LABOR PROTECTIVE BENEFITS WHEN THE

INTERSTATE COMMERCE COMMISSION HAD MORE THAN SUFFICIENT EVIDENCE AND LAW BEFORE IT TO MAKE A DISCRETIONARY DETERMINATION WAS IN ERROR.

The ICC had more than sufficient evidence and law before it to exercise its discretion. However, the ICC took the opportunity to denegrate the evidence presented as not being the right kind upon which to base a discretionary decision in order to avoid a decision granting labor protective benefits to employees of a railroad motor carrier subsidiary. Each and every pleading filed with the ICC and with the various courts cited the discretionary provisions of 49 U.S.C. §11344.

The ICC requested information from the Petitioners concerning their relationship with the rail-

road. Pursuant to the requirements of the ICC, Petitioners submitted approximately 146 pages of verified testimony (including that of the six Petitioners who previously settled with UP). For the sake of brevity, all of that evidence will not be restated herein. The Court's attention is drawn to various highlights including, but not limited to:

a. Petitioners were given identification cards showing "Union Pacific Railroad";

b. Petitioners were issued payroll checks showing initially "Union Pacific Railroad" and thereafter showing "Union Pacific Railroad and Missouri Pacific Railroad";

c. Petitioners performed services in ramping and deramping TOFC and COFC shipments;

d. Petitioners operated motorized vehicles known as a "piggy packer" and hostled trailers for the loading and offloading of railroad flatcars;

e. Petitioners were required to attend safety meetings together with other railroad craft employees

which were conducted by railroad management personnel;

f. Petitioners received safety awards, all of which bore the name and logo of Union Pacific Railroad;

g. Petitioners received service pins for years of service, all of which bore the name and logo of Union Pacific Railroad;

h. Petitioners regularly received magazines, newsletters and other documents from Union Pacific Railroad;

i. Petitioners were required to take physicals and were treated for job-related injuries by Union Pacific's medical doctors;

j. Petitioners were offered membership and some accepted membership into the Union Pacific Railroad Old Timers Clubs;

k. Petitioners were solicited by and contributed to United Way and other charitable functions on behalf of the Union Pacific Railroad;

l. Petitioners received information and in some instances attended Union Pacific Railroad "family day" outings with other railroad personnel;

m. Petitioners were invited and in some instances participated in Union Pacific Railroad stock purchase payroll deduction plans;

n. Some of the Petitioners were filmed on TV advertisements known as the "We're a great big rolling railroad" ads (copies of which were submitted to the Commission with Petitioners' evidence);

o. Petitioners were admitted to the Union Pacific Railroad Store;

p. Petitioners were required to wear yellow safety helmets bearing the name and logo of Union Pacific Railroad;

r. Petitioners received and were required to follow written and verbal rules and policies of Union Pacific Railroad as distributed by the railroad management personnel;

s. Petitioners were invited and some participated in the Union Pacific Railroad Credit Union;

t. Petitioners worked shoulder to shoulder with other railroad craft personnel at the same physical location;

u. Petitioners were supervised by Union Pacific Railroad management personnel as well as UPMF management personnel and were required to follow the directions of both;

v. Petitioners occasionally drove household good vans to transport furniture for Union Pacific Railroad personnel who were being transferred;

w. At least one letter of recommendation was written for a Complainant on Union Pacific Railroad Company stationery stating the Complainant had been employed by "our company" for a certain period of time and did good work; and

x. Prior to the merger, meetings were conducted with Petitioners by officials of the various merging railroads as well as the truck lines advising the employees not to worry, their jobs would be safe.

The ICC majority does not refer to any of these facts even though UP apparently agreed to most of these facts and weakly attempted to refute the facts not agreed to.

The ICC determined that consideration of the evidence of employee activity was an "unnecessary and undesirable" role.[26/] The ICC followed its decision in Pennsylvania R.Co.--Merger--New York

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[26/] ICC Decision, April 12, 1989, at 3.

Central R.Co.,[27] that the identity of the employer was determinative as to who was entitled to mandatory labor protection. "If affected, they are entitled to protection by virtue of their employment relationship and not because they perform so-called 'railroad' work."[28] There was no reason for the ICC to request the information concerning Petitioners' relationship with the railroad unless it intended to review this evidence. The nature of the employee's activities and not just the identity of the employer is a determining factor. The ICC is required to make rational decisions. The Tenth Circuit action was based solely on the identity of the

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[27] 347 I.C.C. 536 (1974).

[28] ICC Decision, April 12, 1989, p.3, Footnote 4.

employer of the railroad workers and completely ignores all of the other facts which unequivocally show both UP and the ICC have traditionally treated Petitioners as railroad employees and the work they performed as railroad work. The ICC focused solely on the fact UP was not Petitioners' employer even in light of the fact Petitioners received their wages on UP payroll checks, were supervised by UP personnel and were issued UP identification cards.

In questioning the majority's opinion, Commissioner Lamboley correctly stated "I fail to understand the relevancy of the majority's argument that determining whether employee activity is rail

work is both an unnecessary and undesirable role."[29/]

The Petitioners submit the majority of the ICC had no intention whatsoever of considering its discretionary role under 49 U.S.C. §11344. It appears obvious it was either frustrated by the reversal of its Decision in Cosby or simply desired to benefit the railroad by helping it to achieve the non-payment of labor conditions to the motor carrier employees of its wholly-owned subsidiary. The National Transportation Policy requires the ICC to consider the interests of employees of

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[29/] On the one hand, the ICC suggests the Petitioners do not submit the necessary information for the ICC to exercise its discretion but on the other hand it suggests the determination is an unnecesary and undesirable role for the ICC.

carriers.[30] The interest of those employees certainly should not be categorized as an unnecessary and undesirable role for the ICC nor should it be automatically affirmed by the courts if any possible ambiguity can be alleged. The ICC majority had all of the information necessary to afford it the opportunity to exercise its discretionary authority if it had the desire to do so. The Petitioners submit it was the intent of Congress to protect workers who work in the rail industry, not simply those who are technical employees of a railroad. The ICC had substantial evidence as previously indicated that the Petitioners worked "shoulder to shoulder" with the technical railroad employees, management and

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[30] 49 U.S.C. §10101.

union, on a daily basis. All evidence was submitted and the steadfast refusal of the ICC to view that information is clearly erroneous. Likewise, the summary affirmation of the Court of Appeals for the Tenth Circuit is contrary to law and should be reversed.

CONCLUSION

For each of the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

Of Counsel:

M.J. Ogborn
Harding & Ogborn
1200 17th Street
Denver, CO 80202
(303) 629-0300

A.M. Lewandowski*
Dysart Taylor
4420 Madison Ave.
Kansas City, MO
(816) 931-2700

Attorneys for Petitioners
*Counsel of Record

91-1128

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OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

CHARLES F. RIVES, II,
Marv A. Seurer; Ronald D. Pester,
Tom Hampleman; R.D. Griffin;
John A. Cameron; Marv Slusser;
and Gene Dudley,
Petitioners,
v.
INTERSTATE COMMERCE COMMISSION,
United States of America,
Respondents.

UNION PACIFIC MOTOR FREIGHT COMPANY,
Intervenor.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Of Counsel:

M.J. Ogborn
Harding & Ogborn
1200 17th Street
Denver, CO 80202
(303) 629-0300

A.M. Lewandowski*
Dysart Taylor
4420 Madison Ave.
Kansas City, MO
(816) 931-2700

Attorneys for Petitioners
*Counsel of Record

DATE: November 15, 1991

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-9530

Charles F. RIVES, II; Marv A. Seurer; Ronald D. Pester; Tom Hampleman; R.D. Griffin; John A. Cameron; Marv Slusser; Gene Dudley,
Petitioners,
v.
INTERSTATE COMMERCE COMMISSION: United States of America,
Respondents.

Union Pacific Motor Freight Company,
Intervenor.

June 6, 1991

Before LOGAN and MOORE, Circuit Judges, and GREENE, District Judge.*

LOGAN, Circuit Judge.

Eight former employees of the Union Pacific Motor Freight Company (petitioners) appeal a decision of the Interstate Commerce Commission

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*The Honorable J. Thomas Greene, United States District Judge for the district of Utah, sitting by designation.

(ICC) denying them labor protective conditions following consolidation of three major railroads. Petitioners contend that the ICC erred in determining that they were not entitled to mandatory labor protection under 49 U.S.C. §11347, and, alternatively, in failing to exercise its discretion to award labor protection benefits under 49 U.S.C. §11344.

This appeal arises out of the consolidation of three western railroads, the Union Pacific Railroad Company, the Missouri Pacific Railroad Company, and the Western Pacific Railroad Company, under the Union Pacific name. The ICC approved the consolidation pursuant to 49 U.S.C. §11343. Union Pac. Corp., 366 I.C.C. 459 (1982), aff'd sub nom. Southern Pac. Trans.

Co. v. ICC, 736 F.2d 708 (D.C.Cir. 1984), cert. denied, 469 U.S. 1208, 105 S.Ct. 1171, 84 L.Ed.2d 322 (1985). In conjunction therewith, the ICC approved Union Pacific's acquisition of Missouri Pacific's and Western Pacific's motor carrier subsidiaries. Union Pacific's motor carrier, the Union Pacific Motor Freight Company (UPMF), continued under the control of Union Pacific.

Petitioners were employees of UPMF at the time of the consolidation. UPMF, as Union Pacific's wholly-owned motor carrier subsidiary, was responsible for ramping and deramping trailers and containers to and from rail cars. Petitioners performed these ramping and deramping operations using "piggy packers", equipment capable of transporting the trailers and

containers to and from staging areas. UPMF had ICC authority to perform regular trucking services, but was limited to auxiliary and supplemental rail service.

Pursuant to 49 U.S.C. §11347, the ICC imposed New York Dock labor protective conditions to protect railraod employees affected by the consolidation.[1/] Petitioners, who were terminated following the consolidation, were denied New York Dock conditions, the ICC holding that petitioners were not entitled because they were not railroad employees. McPherson v. Union Pac. Motor Freight Co., I.C.C. Dec., Fin.

[1/] These conditions were fashioned by the ICC in New York Dock Ry., 360 I.C.C. 60 (1979), Aff'd sub nom., New York Dock Ry. v. Uited States, 609 F.2d 83 (2d Cir. 1979), and include such benefits as displacement or dismissal allowances and continuation of benefits for a specified period.

Dkt. No. 30000, Sub-NO. 45 (McPherson) (Order of April 3, 1987). The ICC later reopened the proceeding to consider further evidence on whether petitioners were entitled to the New York Dock conditions it had imposed for the benefit of others or, alternatively, whether the ICC should use is discretionary authority to impose additional conditions for petitioners' benefit.[2/] The ICC again denied petitioners relief, stating

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[2/] The ICC reopened the proceedings at the request of Union Pacific. Before this request, seven former UPMF employees from Kansas City filed a petition for review with the Eighth Circuit, and seven former UPMF employees from Denver filed a petition for review with this court. The two cases were later consolidated and set for review by the Eighth Circuit. The case was transferred back to this court, however, apparently because six of the Kansas City petitioners, all who resided in the Eighth Circuit, entered into a settlement agreement with Union Pacific.

that its refusal to exercise its discretionary authority was because petitioners had failed to present any evidence or arguments in favor of the ICC exercising its discretion. McPherson, (Order of April 12, 1989).

I

On appeal, petitioners first argue that the ICC erred in finding that they were not within the class of employees protected by the New York Dock conditions imposed for the benefit of those directly employed by the parent railroads. They contend that the ICC's decision, based solely on the identity of the employer, ignores the intent of employee protective conditions and goes against commission and court precedent. The ICC asserts that its decision is consistent with the

Supreme Court's holding in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 1094 S.Ct. 2778, 81 L.Ed2d 694 (1984), and that it acted with due deference to prior commission and court cases.

The statute governing labor protective conditions states, in pertinent part:

> "When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565)."

49 U.S.C. §11347. In the instant case, the ICC construed §11347's

mandatory protections as applying only to those "directly employed by a rail carrier," and, therefore, petitioners, "who were employed by non-rail subsidiaries of the rail carrier" were excluded. McPherson (Order of April 12, 1989, at 3).

When reviewing an agency's construction of a statute it administers, a court must follow a two-step analysis. First, if Congress has directly spoken to the precise question at issue and its intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43, 104 S.Ct. at 2781-82. If Congress has not addressed directly the precise question at issue, the reviewing court "does not simply

impose its own construction on the statute... . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843, 104 S.Ct. at 2782 (footnote omitted). In such a case, the agency's construction is permissible unless it is "arbitrary, capricious, or manifestly contrary to the statute." Id. at 844, 104 S.Ct. at 2782.

A

Applying the first step in the Chevron analysis, we are satisfied that Congress has not unambiguously expressed an intent that employees of a motor carrier subsidiary are entitled to the mandatory protections afforded in §11347.

Although §11347 requires protection for "employees who are affected by" an approved consolidation, the term "employees" is not defined in the Interstate Commerce Act, and we believe, from the words used, it is unclear whether Congress intended to include just those employed directly by the rail carrier or, more broadly, to include at least some employees of noncarrier subsidiary corporations whose jobs might be affected.

The legislative and statutory history of §11347 does not clear up this ambiguity. The ICC argues that the committee reports accompanying §11347, and the language from §11347's predecessor, 49 U.S.C. §5(2)(f), demonstrate Congress' intent that only those directly employed by a rail carrier are

entitled to mandatory protection. The ICC points to the fact that §5(2)(f) used the phrase "railroad employees", directing the ICC to "require a fair and equitable arrangement to protect the interests of the railroad employees affected." 49 U.S.C. §5(2)(f) (repealed 1978). It also notes that the committee reports accompanying §11347 state that §5(2)(f) was recodified for "clarity" and that it was not intended to change the substance of the statute. See H.R.Rep. No. 1395, 95th Cong., 2d Sess. 8, 166, reprinted in 1978 U.S.Code Cong. & Admin.News 3009, 3016, 3175. We are not persuaded. Like §11347, §5(2)(f) did not define "railroad employees." Nowhere in the pre-1978 Act or the legislative history accompanying §11347 is the phrase

"railroad employees" defined; Congress simply never addressed the issue presented in this case.

Two other circuits have considered the issue with opposite results. In Cosby v. ICC, 741 F.2d 1077 (8th Cir. 1984), cert. denied, 471 U.S. 1110, 105 S.Ct. 2344, 85 L.Ed.2d 861 (1985), the court held that employees of an exclusive auxiliary-to-rail motor carrier were "employees" within the meaning of the Act because the motor carrier was "intimately tied to the railroad's main transportation function." Id. at 1081. In contrast, the court in Kansas City Southern Indus., Inc. v. ICC, 902 F.2d 423 (5th Cir. 1990), held that former §5(2)(f) and the reports accompanying the 1978 recodification indicated clearly Congress' intent

that §11347 did "not mandate labor protective conditions for employees of motor carrier subsidiaries of a merging railroad." Id. at 438. Of course, this court is not bound by the decisions of other circuits. We note that Cosby did not discuss the Chevron analysis. We note also that the motor carrier in Kansas City Southern was not restricted to auxiliary-to-rail services and received a majority of its revenues from nonrail-related activities. See Kansas City Southern, 902 F.2d at 438.

B

Because we are satisfied that Congress has not unambiguously expressed its intent, we must decide under the second prong of Chevron whether the ICC's itnerpretation of §11347 is "a permissible

construction of this statute." Chevron, 467 U.S. at 843, 104 S.Ct. at 2782. In making this determination, we are governed by the following standard:

> "Th[e] view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of this very 'complex statute' is a sufficientiy rational one to preclude a court from substituting its judgment for that of [the agency]."

Chemical Mfgrs. Ass'n v. National Resources Defense Council, Inc., 470 U.S. 116, 125, 105 S.Ct. 1102, 1107, 84 L.Ed.2d 90 (1985). See also Young v. Community Nutrition Inst., 476 U.S. 974, 981, 106 S.Ct. 2360, 2364-65, 90 L.Ed.2d 959 (1986).

Bound by this standard, we hold the ICC's interpretation of §11347--that only those directly employed by a rail carrier are entitled to mandatory labor protective conditions--a permissible and rational construction of the statute. The language in former §5(2)(f) mandates protection only for "railroad employees" and the legislative reports accompanying §11347 state that the recodification intended no substantive changes in existing law.[3/] Restricting §11347's

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[3/] The House report states:

> "Substantive change not intended--Like other codifications undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear

mandatory protections to rail carrier employees provides certainty and a logical limit to the scope of employees protected by §11347. Also, a reading as expansive as that petitioners request would render superfluous the ICC's use of discretionary authority under 49

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might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged."

H.R.Rep. No. 1395 at 9, reprinted in 1978 U.S. Code Cong. & Admin.News at 3018. In accord with this legislative history we stated, in Atchison, Topeka & Santa Fe Ry. v. Lennen, 732 F.2d 1495 (10th Cir. 1981), that recodification of the Interstate Commerce Act in 1978 "was not intended to change the law" and that any substantive conflicts between the original language and the new language must be resolved "in favor of the original language." Id. at 1497.

U.S.C. §11344 to give labor protection for other employees affected by a consolidation.

Petitioners may be correct that a more rational interpretation of §11347 would focus on the nature of the work performed, not just the identity of the employer.[4/] That does not make the ICC's

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[4/] Petitioners also argue that the ICC's interpretation of §11347 is unreasonable because it has in the past treated a railroad and its subsidiary as a single transportation system. Under this "single system doctrine," the ICC considers that a corporate family comprised of "a single, integrated transportation system, even though it is made up of several separate corporations ... to be, in effect, one carrier." Brotherhood of Ry. & Airline Clerks v. Burlington Northern, Inc., 671 F.2d 1085, 1089 (8th Cir. 1982). Although the ICC has utilized this doctrine in determining that all rail employees of a railroad's subsidiaries were entitled to labor protection, see Pennsylvania R.R. Co., 347 I.C.C. 536, 546-47 (1974), we know of no cases in which the ICC has applied this doctrine to nonrail employees of a motor carrier subsidiary of a railroad.

interpretation unreasonable. And once we have determined that the agency's interpretation is reasonable, we may not disturb it on review. "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Chevron, 467 U.S. at 844, 104 S.Ct. at 2782. "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches.'" Id. at 866, 104 S.Ct. at 2793 (citation omitted).[5/]

[5/] Because we hold that the ICC's interpretation of §11347 is reasonable, we need not consider petitioners' argument that the ICC erred in not considering evidence relating to thier job descriptions

II

Finally, petitioners argue that the ICC erred in refusing to award protective conditions under its discretionary authority. This argument centers on 49 U.S.C. §11344(c), which permits the ICC, in its discretion, to provide labor protection for other persons affected by a rail consolidation.[6/]

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and relationships with Union Pacific before making its determination. Under the ICC"s "identity of the employer" standard, such evidence is not relevant in deciding whether petitioners are "railroad employees" entitled to labor protection. Therefore, it does not affect our determination of reasonableness. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto.Ins., 463 U.S. 29, 43, 103 S.Ct. 2856, 2866-67, 77 L.Ed.2d 443 (1983).

[6/] Section 11344(c) states, in pertinent part:

> "The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may

In the instant case, the ICC expressly refused to consider using its discretion because petitioners failed to present any supporting arguments at the reopening proceeding, despite being invited to do so. See McPherson (Order of April 12, 1989, at 3). The ICC now contends that this failure precludes our consideration of this issue on appeal.

All issues a party contests on appeal must be raised at the appropriate time under the agency practice. United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 37, 73 S.Ct. 67, 69, 97 L.Ed. 54 (1952). Failure of a party to represent its contentions properly to the agency precludes appellate review. New Mexico Envtl. Improvement Div. v.

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impose conditions governing the transaction..."

Thomas, 789 F.2d 825, 835-36 (10th Cir. 1986). A court may not substitute its judgment for that of the agency when "the agency has not had an opportunity to make a factual record or apply its expertise." Id. at 835.

In the instant case, all of the evidence presented by petitioners was directed to whether they were employees within the meaning of §11347. The petitioners' evidence sought to demonstrate the similarities between UPMF employees and Union Pacific employees. Petitioners contend that their employment comparison evidence presented in reference to §11344 was sufficient for the ICC to consider using its discretionary power. We disagree. The ICC reopened the proceedings to reconsider the issue

of employment protective conditions for UPMF employees. The ICC expressly requested evidence and arguments on two issues:

> "The [petitioners]...may present evidence on whether they were railroad employees who qualify for mandatory labor protection under 49 U.S.C. 11347. They may also seek to demonstrate that the Commission should exercise its discretionary authority under 49 U.S.C. 11344(c) to provide protection for motor carrier employees."

McPherson (reopening order of August 10, 1987, at 2). The evidence submitted by petitioners was, in essence, the same as that submitted in the original proceeding when the only issue was whether they were railroad employees under §11347. No separate evidence or argument was directed at the availability of discretionary protection. Petitioners presented no evidence of

financial hardship or a lack of marketable skills, which the ICC might consider relevant in deciding whether to grant discretionary benefits. Petitioners had the burden to present their case to the ICC for consideration and their failure to properly present the issue of discretionary protection to the ICC precludes our review.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-9530

CHARLES F. RIVES, II, et al.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION,
et al.,
Respondents.

ORDER

Filed August 20, 1991

Before HOLLOWAY, Chief Judge, LOGAN, KcKAY, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges, and GREENE*, District Judge.

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*The Honorable J. Thomas Greene, United States District Judge for the District of Utah, sitting by designation.

This matter comes on for consideration of petitioners' petition for rehearing and suggestion for rehearing en banc in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service. No member of the panel and no judge in regular service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, CLERK

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30000

UNION PACIFIC CORPORATION,
PACIFIC RAIL SYSTEM, INC. AND
UNION PACIFIC RAILROAD COMPANY -
CONTROL - MISSOURI PACIFIC
CORPORATION AND
MISSOURI PACIFIC RAILROAD COMPANY

Finance Docket No. 30000
(Sub-No. 45)

GARY W. McPHERSON
v.
UNION PACIFIC MOTOR FREIGHT COMPANY,
ET AL.

Decided: April 3, 1987

In Union Pacific - Control - Missouri Pacific; Western Pacific, 366 I.C.C. 459 (1982) (UP/MP/WP), we authorized, inter alia, the Union Pacific Corporation and Union Pacific Railroad and Missouri Pacific Railroad Company (MP), subject to certain conditions including labor protective conditions. For the protection of

carrier employees affected by that transaction, we imposed the conditions specified in New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock), unless an agreement for employee protection had been entered into, in which case we imposed the specified negotiated level of protection. 366 I.C.C. at 618-622.

In UP/MP/WP, 366 I.C.C. at 654, we also approved the acquisition by UP of a motor carrier subsidiary of MP -- Missouri Pacific Truck Lines, Inc. (MPTL). At the time of the acquisition, UP also controlled, and it continues to control, a motor carrier -- Union Pacific Motor Freight Company (UPMF).

This proceeding involves a number of complaints by employees of

the UP-MP controlled motor carriers. They allege that the protections we mandated have not been effected.

BACKGROUND

1. The Denver complainants. By letter-petition dated November 14, 1985, six former employees of UPMF[1/] contend that they were terminated, effective November 8, 1985, without prior notice, from their jobs at UPMF's TOFC ramp operations at Denver, CO. These employees allege that MPTL now operates the Denver facility and that they lost their jobs as a direct result of the 1982 consolidation of UP and MP. They allege that UPMF should have offered

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[1/] While the initial letter referred to six individuals, argument and evidence was submitted for seven: Marv Slusser, Wheatridge, CO.; Gene Dudley, Denver, CO; John A. Cameron, Erie, CO; Tom Hampleman, Wheatridge, CO; Marv A. Seurer, Wheatridge, CO; R.D. Griffin, Erie, CO; and Ronald D. Pester, Lakewood, CO.

them other jobs, or compensation, as required by the New York Dock conditions imposed in the merger proceeding.

We reopened the merger proceeding in a decision served February 18, 1986, stating that we were treating the letter as a petition for clarification. We directed the employees to file evidence and argument and for UP-MP to reply.

Complainants state that they were employees of UPMF in Denver for at least 22 years and contend that they lost their jobs at the Denver ramp as a direct result of the UP-MP consolidation. They argue that the labor protection provided in New York Dock applies to all employees of UP-MP, including employees of motor carrier subsidiaries of the

railroads, citing Cosby v. I.C.C., 741 F.2d 1077 (8th Cir. 1984).

They base their position on 49 U.S.C. 11347, which provides:

> ...the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of Title 45. (Emphasis added by complainants.)

UP-MP, in rebuttal here, states that the complainants were not affected by the consolidation and, even if they were, that the labor protective conditions imposed in the consolidation under 49 U.S.C. 11347 are not applicable to employees of motor carrier subsidiaries of railroads. UP-MP indicates that its motor carrier subsidiaries are completely independent corporate

units. It states that the Denver employees of UPMF were not replaced by MPTL employees but by those of another company that was not related to the UP-MP corporate family. UPMF bid against several other companies on a contract to perform trucking services at the Denver terminal, and lost. UP-MP states that it has sought contracts for many of its terminals and that its UPMF subsidiary has to compete with both corporate affiliates and numerous non-affiliated firms for the railroad's business. It indicates that in some instances UPMF has been able to retain contracts for terminal operations at some locations, but has been unsuccessful at others. Its corporate policy dictates that UP have motor carrier services provided for it at the

lowest possible cost. UP-MP presented evidence to show that UPMF and MPTL are independent entities that must compete with non-affiliated motor carriers if they wish to continue to perform operations for UP.

UP-MP argues that the protections for employees in New York Dock were intended to be restricted to railroad employees and were not intended to cover employees of rail-affiliated motor carriers. Defendant rejects the interpretation given to 49 U.S.C. 11347 by complainants and the court in Cosby. UP-MP argues that the recodified 49 U.S.C. 11347 was never intended to provide labor protection to non-railroad employees, because Congress and the Commission long recognized that the employment skills of motor

carrier employees were much more transferable than those of railroad workers.

UP-MP also contends that the Commission has declined to follow the logic of Cosby, with regard to labor protection for employees of motor carrier subsidiaries. It cites Milwaukee--Acquisition by GTC, _____ I.C.C.2d _____ (1985) (Milwaukee); Norfolk Southern Corp.--Control--North American Van Lines, 1 I.C.C. 2d _____ (1985) (NS/NAVL).

The Railway Labor Executives Association filed a comment on March 17, 1986, indicating that it supported Cosby's apparent determination that employees of motor carrier subsidiaries of railroads are entitled to labor protective conditions. This comment

included a statement by Dean T. Echols, Associate Director, Industry Relations with the Brotherhood of Railway and Airline Clerks. However, in a supplemental comment filed April 1, 1986, RLEA withdrew Mr. Echols' statement.

2. The Kansas City complainants. On May 21, 1986, former employees of UPMF in Kansas City, MO filed a "Petition to Reopen and Request for Enforcement" in the consolidation proceeding.[2/] Petitioners allege that they were all employees of UPMF at the time of the merger of UP and MP and subsequently lost their jobs as a result of the merger. They believe they are

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[2/] These employees are: Louis C. Burris, Gladstone, MO; Larry A. Creiger, Oak Grove, MO; David C. Doleshal, Kansas City, MO; Steve Harter, Kansas City, MO; Raymond May, Kansas City, MO; Charles Payne, Kansas City, KS; and Charles F. Rivers II, Olathe, KS.

entitled to labor protective conditions specified in New York Dock under Cosby.

UP-MP responds to these allegations in much the same manner as it did to the filing by the Denver employees, indicating that the statements of the court in Cosby concerning the automatic application of labor protective conditions to employees of affiliated motor carriers were only dicta and that, subsequent to Cosby, we have rejected that interpretation. UP-MP also reiterates its position that motor carrier employees were never intended to receive the levels of labor protection found in 49 U.S.C. 11347, because the nature of their employment does not require the enhanced level of protection the statute provided for employees

performing railroad work.

3. Gary W. McPherson. In a complaint filed April 25, 1986, Gary W. McPherson alleged that he was an employee of UPMF, that his employment was terminated, and that he was entitled to job protection under 49 U.S.C. 11347.[3/]

On July 17, 1986, UP-MP filed a motion to dismiss this complaint, making the same arguments it made in response to the pleadings of the Denver and Kansas City complainants. Concurrently, UP-MP filed a Petition for Extension of Time in Which to Answer Complaint, requesting that

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[3/] Complainant was offered severance pay of one month for each year of service. It appears that Mr. McPherson was in the process of accepting this offer when he was told that, instead, he would be offered a job as vacation relief in various cities. He apparently refused this position, was terminated, and subsequently filed this complaint.

the due date on their answer be extended until twenty days after the Commission ruled on their motion to dismiss. Complainant replied.[4/] Because of the similarity of issues, we are consolidating all three complaints in this proceeding.

DISCUSSION AND CONCLUSIONS

Logic would dictate that the first question to be answered here must be whether complainants were affected by the merger itself, as such a factual finding is necessary to relief. However, the Commission does not resolve disputes over the applicability of labor protective conditions to individual employees. Complainants have asserted, and UP has contested, that the UP/MP/WP consolidation was the cause of complainants' displacement. This

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[4/] UP-MP has not filed a reply to the McPherson complaint.

factual issue of "causation" (i.e., whether particular employees are "affected" by a Commission-approved transaction or whether adverse consequences to employees were the result of such a transaction) is not for the Commission's determination, but is within the proper province of an arbitrator or the parties' negotiations. See Leavens v. Burlington Northern, Inc., 348 I.C.C. 962, 975, 979 (1977); Walsh v. United States, 723 F.2d 570, 575 (1983); Bell v. Western Maryland Railway Company, 366 I.C.C. 64, 67 (1981). Even when we impose labor protective conditions, we do not resolve these causation issues. Therefore, we will not consider evidence submitted on the question of whether complainants' displacement was a result of the

UP/MP/WP transactions.

Nevertheless, even assuming for purposes of discussion that complainants' job loss was the result of the UP/MP/WP merger, we find that the labor protective conditions imposed in our decision in UP/MP/WP were not for the benefit of complainants. We also see no basis for imposing such protection now.

Complainants' principal claim is that they are entitled to the protections mandated by section 11347, which are reflected in the New York Dock conditions. Their claim of mandatory protection must fail because they were employees of a motor carrier, UPMF, not railroad employees, as former section 5(2)(f) of the Interstate Commerce Act, the predecessor to section 11347,

required, and as we must continue to interpret that provision.[5] Moreover, long-standing precedent holds that the mandatory protection of Section 11347 does not extend even to employees of non-rail subsidiaries of a railroad.[6] Accordingly, there is no requirement in the Interstate Commerce Act that complainants, who are not rail carrier employees, must be protected

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[5] See Milwaukee, slip op. at 16 and NS/NAVL, slip op. at 37, discussing the prohibition on attributing substantive change to the 1978 recodification and citing Cass v. United States, 417 U.S. 72, 82 (1974) and Atchison, Topeka & Santa Fe Railway v. United States, 617 F.2d 485, 490 (7th Cir. 1980).

[6] Pennsylvania Railroad-Merger-New York Central Railroad, 347 I.C.C. 536 (1974). See also Milwaukee, slip op. at 16, discussing differing standards for motor and railroad employees due to more adaptable skills of motor carrier employees, citing American Bus Lines, Inc. v. United States, 253 F. Supp. 481 (D.D.C.), aff'd per curiam, 385 U.S. 38 (1966).

from the effects of the UP/MP/WP consolidation. Moreover, complainants have not demonstrated that the motor carriage performed by UPMF was limited to transportation that is auxiliary to rail movements and so intimately connected to UP's main transportation system so as to transform complainants into "railroad employees," as described in dicta in Cosby, 741 F.2d at 1080-81. Cf. Milwaukee, slip op. at 16-17.

Notwithstanding this conclusion, the Commission has discretionary authority under section 11344(c) to provide protection for motor carrier employees. There was, however, no request for protection by complainants or any other motor carrier employee during the UP-MP-WP proceeding. Also, there has been no showing, as there was in

Cosby, of pre-merger representations by management to complainants that might have deterred them from seeking protective conditions in the UP/MP/WP decision. On the contrary, UP management distinguished between protection for railroad craft union employees and "non-agreement" employees, with the latter eligible for only separation allowances if displaced by the transaction.

In Cosby, supra, the United States Court of Appeals for the Eighth Circuit stated that carrier employees of a wholly owned motor carrier subsidiary are entitled to the labor protection benefits required by section 11347. The court said that, even if the Commission had discretion to grant or deny protective conditions, it was an abuse of discretion given the facts

in that case not to grant the motor carrier employees the same level of protection granted applicant's railroad employees. The court cited a number of assurances made by officials of Burlington Northern to the effect that no employee would face involuntary unemployment as a result of the merger and statements to the effect that the operation of the motor carrier would not be changed. Especially relevant to the court in Cosby was the statement by C.M. Illg, Assistant Vice President-Labor Relations of BN, 741 F.2d at 1083:

> With the exception of clerical employees at Springfield, it is expected that the bulk of surplus employees created at any point and in any craft will be absorbed almost immediately on new positions and other vacancies caused by employees leaving service in the normal course of events... Those employees

> who do become surplus, or are displaced or are transferred due to the traction will be covered by protective benefits.

The Cosby court determined that this type of assurance gave the motor carrier employees no reason to seek to intervene in the merger proceeding, or to request their union to do so to protect or clarify management's intentions.

Such assurances were not made to UP/MP employees in this consolidation proceeding. The evidence presented in the UP/MP/WP proceeding by UP-MP clearly and consistently maintained that certain specified employees -- almost exclusively railroad craft union employees -- would receive the level of protection mandated in 49 U.S.C. 11347, while others would receive "severance benefits." Thus non-

railroad craft union employees were not misled by management assurances into refraining from seeking protection by participating in the merger proceeding.

The testimony of Philip A. Jordan, Vice President-Labor Relations and Personnel of UP is especially relevant.[7/] In his verified statement filed with the merger application, he consistently maintained that there would be a dichotomy of treatment with respect to labor protective conditions for affected employees. He maintained the distinction throughout his testimony between "agreement employees" (railway craft union) and "non-agreement employees" (others).

[7/] Verified Statement of Phillip A. Jordan in Finance Docket No. 30000, "Verified Statements of Applicants, Part I, Statements of Applicants' Officers in Support of Applications."

He stated:

> The principal adverse work force impact will be felt by non-agreement employees....
>
> In all instances non-agreement employees whose jobs are abolished will be given the opportunity to transfer to other positions without any reduction in salary level and will be reimbursed for moving expenses and any losses on the sale of their homes. Based on experience with past organizational changes involving nonagreement employees, we expect that most will desire to take advantage of this offer. For those for whom there is no other position available at their present location and who do not want to transfer, we will offer a separation allowance based on years of service up to one years' pay with a maximum of $35,000....
>
> Labor protection costs for non-agreement employees affected by the UPRR-MRRR and UPRR-WPRR consolidations were calculated using different assumptions reflecting different management policies. Affected UPRR-MPRR non-agreement employees

> were assumed to be absorbed by attrition during the first year after consolidation as they transferred to new job openings or elected a separation allowance. UPRR-WPRR non-agreement affected positions were assumed to be abolished promptly upon consummation, with incumbents accepting other non-agreement positions in the combined system or receiving a separation allowance.... (Emphasis added.)
>
> ....Non agreement employees whose positions are adversely affected will be given other job opportunities or a severance allowance.
> (Emphasis added.)

It is apparent that any employee who examined these statements would understand that a clear distinction was being made between the benefits of agreement employees and those of non-agreement employees. These distinctions are being made by the official in charge of labor relations-personnel for the

controlling carrier, and are distinctions widely understood by the unions, the railroad, and this Commission. Complainants, by examining this testimony and the common parlance of the industry, could assume that they were not "agreement employees," yet they or their union took no action to clarify or challenge management's position on the issue of severance benefits.

Certain assurances made by the merger applicants in UP/MP/WP also require review. On pages 189-90 of the application it is stated:

> Union Pacific Corporation, Pacific Rail System and Union Pacific Railroad do not intend to change the operations of Missouri Pacific Truck Lines. Rather, Missouri Pacific Truck Lines will continue to provide motor carrier service as a subsidiary of Missouri Pacific Railroad. Therefore, there will not be any effect on carrier

employees from approval of this application.

Viewed in the light least favorable to the merger applicants, this would appear to be an assurance that no MPTL employee would be affected by the merger. Taken in context of the other testimony presented in the proceeding, most notably Mr. Jordan's statement quoted above, this statement would appear at most to assure non-agreement motor carrier employee a severance package.[8/]

[8/] As discussed above (p. 7), there is no statutory requirement of protection for displaced motor carrier employees, unlike rail employees, but the Commission has discretion to impose protection for motor carrier employees, if requested. No request was made here. Even if such a request had been made, we would not have imposed more generous protections than the overall protection offered nonagreement employees here. See American Buslines, Inc. (discussed in n.6, supra) upholding "the customary protection in motor carrier cases of three months'

Because the motor carrier employees had adequate notice that the protective conditions required to be established for rail employees would not be established by the applicants for their benefit, and because the employees did not request the Commission to impose such conditions, we did not abuse our discretion under section 11344(c) by refraining from imposing protective conditions for the benefit of the motor carrier employees in UP/MP/WP. Complainants, who failed to participate in the merger proceeding, have shown no basis for reopening this long-closed proceeding, and only now imposing such protection along with the possibility of unforeseen obli-

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severance pay payable to the adversely affected employees." 253 F.Supp. 482-83.

gations on the merged carriers, under section 11344(c).[9/] Accordingly, we find Cosby not controlling.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The request for labor protection filed by Marv Slusser, Gene Dudley, John A. Cameron, Tom Hampleman, Marv A. Seurer, R.D. Griffin, and Ronald D. Pester is denied.

2. The petition to reopen and request for enforcement filed by Louis C. Burris, Larry A. Creiger, David C. Doleshal, Steve Harter, Raymond May, Charles Payne, and

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9/ See Milwaukee, slip op. at 17; NS/NAVL, slip op. at 38, n. 46.

Charles F. Rivers II is denied.

3. In F.D. 30000 (Sub.No. 45), the motion to dismiss filed by defendants Union Pacific Motor Freight Company, Union Pacific Railroad Company, Missouri Pacific Railroad Company, and Missouri Pacific Truck Lines, Inc. is granted, the petition for extension of time is dismissed and the proceeding is dismissed.

4. This decision is effective on May 18, 1987.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Vice Chairman Lamboley dissented in part with a separate expression.

(SEAL)

Noreta R. McGee
Secretary

VICE CHAIRMAN LAMBOLEY, dissenting in part:

I would reopen this proceeding and schedule an oral hearing to examine further the claims of the Kansas City complainants. In my view, they have made allegations and offers of proof of facts arguably sufficient to bring their complaint with the ambit of the holding of Cosby v. I.C.C., 741 F.2d 1077 (8th Cir. 1984), cert. denied, 105 S. Ct. 2344 (1985).

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30000

UNION PACIFIC CORPORATION,
PACIFIC RAIL SYSTEM, INC.,
UNION PACIFIC RAILROAD COMPANY -
CONTROL - MISSOURI PACIFIC
CORPORATION AND MISSOURI
PACIFIC RAILROAD COMPANY

Finance Docket No. 30000
(Sub-No. 45)

GARY W. McPHERSON

v.

UNION PACIFIC MOTOR FREIGHT
COMPANY, ET AL.

Decided: April 12, 1989

By decision served August 17, 1987, we reopened these matters at the request of the Union Pacific parties (UP/MP)[1] to entertain evidence on limited issues concerning whether former employees of

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[1] Union Pacific Motor Freight Company, Union Pacific Railroad Company, Missouri Pacific Railroad Company, and Missouri Pacific Truck Lines, Inc.

the Union Pacific Motor Freight Company (UPMF) are entitled to labor protection.[2] Complainants[3] had earlier asked the Commission to find that its decision approving

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[2] Following a review of allegations by parties seeking judicial review, UP/MP concluded that the Commission's April 21, 1987 decision denying labor protection for some petitioners and refusing to reopen the matter for others reflected a misunderstanding of certain evidence regarding whether the motor carrier employees had sufficient notice of the consequences of UP Control and protections they might receive. UP/MP believed that other evidence should have been considered, and that the proceeding should be reopened.

[3] The Denver complainants are: Marvin Slusser; Gene Dudley; John A. Cameron; Tom Hampleman; Marv A. Seurer; R.D. Griffin; and Ronald D. Pester. The Kansas City complainants are: Louis C. Burris; Larry A. Creiger; David C. Doleshal; Steve Harter; Raymond May; Charles Payne; and Charles F. Rivers II. The Commission included Gary W. McPherson in the proceeding.

By pleading filed September 13, 1988, the parties advised us that complainants Burris, Creiger, Doleshal, Harter and Payne had entered into a settlement agreement with UP/MP, and withdrawn their

consolidation and imposing labor protective conditions in Union Pacific - Control-Missouri Pacific; Western Pacific, 366 I.C.C. 459 (1982) (UP Control) mandated benefits for adversely affected employees of motor carrier subsidiaries, as well as railroad employees of the Union Pacific Railroad Company (UP) and the Missouri Pacific Railroad Company.

In our August decision, we gave complainants an opportunity to demonstrate that they should receive labor protection under the mandatory standards set forth at 49 U.S.C. 11347, or in the exercise of the Commission's discretion under section 11344(c). They have demon-

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claims. By pleading filed November 9, 1988, the parties advised us that complainant May had entered into a settlement agreement with UP/MP, and withdrawn his claim.

strated neither. They presented no evidence or argument concerning our discretionary authority, although our August 17 decision specifically stated that we would entertain such a discussion. Instead, they sought (as they had earlier) to demonstrate that the Commission should find them qualified for mandatory labor protection under section 11347. They take the position that the decision of the court in Cosby v. ICC, 741 F.2d 1077 (8th Cir.), cert. denied, 471 U.S. 1110 (1984) (Cosby) requires us to conclude that motor carrier employees of railroad subsidiaries whose jobs may have been affected as a consequence of rail consolidations must be provided labor protection. As we have previously, we reject that

conclusion, and find that the complainants here are not entitled to labor protection.

The Cosby court, in considering claims for protective benefits from employees of a motor carrier subsidiary of a merged railroad, found that in the circumstances presented there the employees were entitled both to mandatory protection under section 11347 as railroad employees and to discretionary protection under section 11344. The Commission has consistently disagreed with Cosby to the extent it requires that labor protective benefits be awarded, because it does not reflect Commission precedent. We again reject Cosby's conclusion that motor carrier employees may be entitled to

labor protection under 49 U.S.C. 11347, and take this opportunity to explain our position.

Former section 5(2)(f) of the Interstate Commerce Act, the predecessor to section 11347, directed the Commission to "require a fair and equitable arrangement to protect the interests of the railroad employees affected" by consolidation. (Emphasis added.) Historically, the Commission interpreted this to mean that employees of non-rail subsidiaries were not entitled to mandatory labor protections. See Pennsylvania Railroad-Merger-New York Central Railroad, 347 I.C.C. 536 (1974) (Penn Central). The 1978 recodification of the Interstate Commerce Act requires the Commission to "provide a fair arrangement at least

as protective of the interests of employees who are affected by the transaction. . .". (Emphasis added.)

Language in the recodification clearly states that "Sections 1 and 2 of this Act [which includes section 11347] restate, without substantive change, laws enacted before May 16, 1978." Section 3(a) of Public Law 95-473, 92 Stat. 1466. (Emphasis added.) In Cass v. United States, 417 U.S. 72 (1974), the Supreme Court found that Congressional comments that there would be no substantive change, combined with the fact that no consideration of any change in the standards at issue appeared in the legislative history, conclusively demonstrated that no changes in the standards were contemplated by Congress when it made some changes in style and

form in the statute at issue there. In a case concerning the 1978 recodification at issue in the instant proceeding, the court stated that, where Congress had twice and without qualification stated that the recodification effects no substantive change in the prior law, the court must examine the language of the Interstate Commerce Act prior to recodification to determine the intent of Congress. Atchison, T. & S.F.Ry. Co. v. United States, 617 F.2d 485 (1980). Consequently we adhere to the view that 49 U.S.C. 11347 directs us to protect the interests of affected railroad employees, and not employees of non-rail subsidiaries. Penn Central, supra. The interpretation given to the recodification by the Cosby

court is inconsistent with the expressed intent of the Congress concerning the recodification.

Relying on that part of Cosby that focused on the type of work performed at the motor carrier (741 F.2d at 1080-81), complainants attempted to demonstrate that the work they did was "railroad" work, and that they consequently should be considered railroad employees for our purposes here. We find it difficult to determine the appropriate boundaries of "railroad" work (that is, deciding the nature of the tasks that might under Cosby bring non-railroad employees within section 11347 and qualify them for mandatory 6 year protection at their current wage level). We question whether Congress intended such a flexible interpretation of the

statute, particularly when it has supplied no guidelines for this task. Our conclusion in Penn Central, which we affirm, was that the identity of the employer was determinative as to who was entitled to mandatory labor protection.[4]

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[4] As we have discussed, Congress specified that mandatory protection was to be provided for "railroad employees," i.e., employees of railroads. We are simply assuming that Congress meeant what it said.

Consistent with the approach we are taking here, we have not in the past analyzed the nature of the work performed by those employed directly by a railroad. If affected, they are entitled to protection by virtue of their employment relationship and not because they perform so-called "railroad" work. See Finance Docket No. 21478 (Sub-No. 6), Great Northern Pacific & Burlington Lines, Inc. Merger - Great Northern Railroad (not printed), served December 11, 1986 (tax agent); Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977) (eligibility of protection for attorney for railroad questioned because he was arguably a member of management but not because of nature of work).

Only individuals directly employed by a rail carrier are entitled to protection under section 11347. This excludes the complainants, who were employed by non-rail subsidiaries of the rail carrier.[5] This conclusion is consistent with our holdings in Milwaukee - Reorganization - Acquisition by GTC, 2 I.C.C.2d 427 (1985), and Norfolk Sourthern Corp. -- Control -- North American Van Lines, Inc., 1 I.C.C.2d 844 (1985), rev'd. on other grounds sub nom.

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[5] Our April 21, 1987 decision in this proceeding originally rejecting complainants' claims discussed the failure to demonstrate the work performed by UPMF was so intimately connected to UP's main transportation system so as to transform the complainants into railroad employees. As we indicated, this approach was described in Cosby at 1080-81. We adhere to the view that, whatever the nature of the work, the crucial test is the identity of the employer.

International Brotherhood of Teamsters v. ICC, 801 F.2d 143 (D.C. Cir. 1986), aff'd on rehearing, 818 F.2d 87 (D.C. Cir. 1987). In these cases we discussed (and rejected) arguments that petitioners performed rail-related work, but this does not mean that we were accepting Cosby's conclusion that section 11347 may require labor protection for employees of non-rail subsidiaries of the rail carrier. To adopt an approach requiring the Commission to examine each job performed in a non-rail subsidiary to determine whether it is the type of work that strikes us as being railroad work is both an unnecessary and undesirable role for the Commission to fashion for itself.

In the case noted above, we did consider Cosby's alternative discussion of our discretionary authority under section 11344(c), and found protection not to be justified. There is no need to discuss whether we should exercise our discretionary authority under 49 U.S.C. 11344(c) here because complainants did not address that issue, in spite of our invitation that they do so.

For all the foregoing reasons, we will deny complainants' request for labor protection under 49 U.S.C. 11347.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Complainants' requests for labor protection are denied, and this proceeding is discontinued.

2. This decision will be effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips. Vice Chairman Simmons and Commissioner Lamboley dissented with separate expressions.

Noreta R. McGee

Secretary

(SEAL)

VICE CHAIRMAN SIMMONS, dissenting:

I disagree with the majority's refusal to consider and determine the facts and issues of this case under Cosby. When faced with the issue of whether employees of a motor carrier subsidiary of a merged

railroad are "railroad employees" for purposes of 49 U.S.C. 11347, I believe that the Commission must take into account the Cosby decision and not simply shrug it off. While we may view that decision as inconsistent with prevailing Commission precedent, it is, nevertheless, controlling and binding until otherwise reversed by the courts or legislation.

Given that, I agree that there may be instances when it might be difficult to determine what constitutes the boundaries of railroad work. However, for motor carrier employees involved directly and exclusively in TOFC/COFC operations, it is much easier to make a determination under Cosby where the court found persuasive the argument that those motor carrier operations

incidental to the parent railroad's operations may entitle the employees of the carrier to protections. This is because the Commission has already declared that railroad affiliated motor carrier operations involving the over-the-road portion of trailer-on-flatcars (TOFC) and container-on-flatcar (COFC) are services "related to a rail carrier." See Improvement of TOFC/COFC Regulations (Railroad-Affiliated Motor Carriers and Other Motor Carriers), 3 I.C.C. 2d 869 (1987). While that decision dealt with whether the rates of railroad affiliated motor carriers involved in TOFC/COFC operations should be exempt, the Commission had to first make a determination that the type of transportation provided by the motor carriers' affiliates is

"related to a rail carrier" under 49 U.S.C. 10505. It stands to reason then that if the nature of the transportation in which these employees were involved at the time of the merger are rail-related, they have met one Cosby requirement. On the other hand, I am not certain whether complainants have proven that they were persuaded by proper UP management that they would receive New York Dock and therefore, relying on such representations, did not assert their interests during the merger proceeding. It may be that both factors of Cosby must be present. Because of this, I would invoke Commission discretion, and leave this matter to arbitration. I would also leave open the question as to whether these particular employees were solely and

exclusively involved in TOFC operations and whether they were adversely affected as a result of the merger.

COMMISSIONER LAMBOLEY, dissenting:

Earlier, in this case as in others, I have dissented from the majority's rejection of the view, that in appropriate circumstances, employees of an integrated motor carrier subsidiary may be eligible for labor protection under provisions of § 11347.[1]

In my view, the majority's position runs contrary to statute and precedent.[2] Nothing in the

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[1] See, e.g., earlier dissent in FD No. 32000, Et Al., Rio Grande Industries, Inc., SPTC Holding, Inc., and The Denver and Rio Grande Western Railroad Company - Control - Southern Pacific Transportation Company, 4 I.C.C.2d 834, 974 (1988) (DRGW).

[2] See and compare 49 U.S.C. § 11347

legislative history limits or precludes eligibility for protections of persons employed by motor carriers providing services substantially integrated with and directly beneficial to the rail carrier activity involved in the subject transaction.

Heretofore, the Commission has declared that it has never specified the "class of employees" covered by its protective conditions, and has consistently declined to define "employee" on the ground that once the conditions have been imposed, the matter is for interpretation by the Courts, or resolution by

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with former § 5(2)(f) (49 U.S.C. § 5(2)(f). 49 U.S.C. § 11344(c) and Cosby v. I.C.C. 741 F.2d 1077 (8th Cir. 1984) cert. den. 471 U.S. 1110 (1984). But see Milwaukee Reorganization I, 2 I.C.C.2d 161 (1984) and II 2 I.C.C.2d 427 (1985), and DRGW, supra.

arbitration. Bell v. Western Maryland Ry. Co. 366 I.C.C. 64, 66-67 (1981).[3]

Accordingly, I fail to understand the relevancy of the majority's argument that determining whether employee activity is rail work "is both an unnecessary and undesirable role for the Commission to fashion for itself." There is neither reason nor need for the Commission to determine the parameters of such activity. Arbitration is a readily available and appropriate resolution for those fact-bound circumstances.

The present record evidences that Union Pacific Motor Freight Company (UPMF) was intimately and significantly tied to the railroad's

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[3] See also Chicago St. P M & O Ry Co. Lease 295 I.C.C. 441, 443 (1956).

main service functions as an integral part of the overall transportation system.[4] UPMF's primary role was to participate in the railroad's TOFC/COFC operations. In doing so, the petitioning employees, among other intermodal duties, operated rail equipment known as a "Piggy Packer" to off-load trailers from the flat cars. These operations are obviously directly rail-related for substantial and beneficial railroad purposes.

In general, I conclude that employees of motor carrier subsidiaries, who perform rail-related services substantially integrated with and directly beneficial to the

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[4] Indeed, the public reports of reason for UP acquisition of motor carrier, Overnite Transportation Co., reflect the railroad's desire to effectively and efficiently integrate intermodal subsidiaries.

rail carrier activity involved in the transaction subjected to conditions, may be considered eligible for coverage by the imposed conditions. In this particular case, I find that employees who directly and substantially perform rail-related services for an integrated motor carrier subsidiary operation may be eligible for protection to ameliorate adverse employment consequences of the 1982 merger transaction. Employment and causation questions concerning the nature and scope of employment activities as being directly and significantly rail-related, and whether the actions taken in Kansas City and Denver do, in fact, result from the merger, can, and should be resolved by an arbitration.[5]

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[5] Because I conclude protection is available under § 11347, I do not

Finally, the recent proceeding in FD No. 31423, Missouri Pacific Truck Lines, Inc. - Merger Exemption - Katy Transportation Co. (not printed), served March 17, 1989, (MoPac/Katy) deserves comment. In MoPac/Katy, the Commission, in exempting the merger of the motor carriers respectively owned by merging rail carriers, MoPac and Katy,[6] mandated protection for "railroad employees". Obviously, the Commission found a sufficient nexus of activity between the integrated motor carrier subsidiaries and the merged rail carrier for the purposes of

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reach the question of "discretionary imposition of conditions." See e.g., Walters v. Roadway Express, Inc. 557 F.2d 521 (5th Cir. 1977).

[6] See FD No. 30800, Union Pacific Corp. Et Al. - Control - Mo-Ks-Tx Co. Et Al. 4 I.C.C.2d 409 (1988) (UP/MKT).

protective conditions. A similar premise for protection of motor carrier employees may likewise exist in rail carrier merger proceedings.[7]

I fail to see a rational basis for distinguishing the grant of merger protection for "railroad" employees of integrated motor carrier subsidiaries, on the one hand, form the denial of protections for "other" employees of similarly integrated motor carriers who can demonstrate that they too perform substantial services directly realted and beneficial to the rail component in the merging transportation systems, on the

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[7] "Railroad employees" are not defined in the MoPac/Katy motor carrier decision. Protection was mandated for "rail employees" in the UP/MKT rail carrier case. Id. at 531.

other. It is the character of employment not the identity of the employer that I find determinative.

§ 11344. Consolidation, merger, and acquisition of control: general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title [49 USCS § 11343] on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 et seq.] is involved in the transaction, the Commission must

notify the persons specified in section 10328(b) of this title [49 USCS § 10328(b)]. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter [49 USCS §§ 10501 et seq.] is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b)(1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

(2) In a proceeding under this section which involves only carriers of passengers providing transportation subject to the juris-

diction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 et seq.], the Commissioner shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only

if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest. (Oct. 17, 1978, P.L. 95-473, § 1, 92 Stat. 1436.)

(d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the

Commission, the Commission shall approve such an application unless it finds that-

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2)the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In making such findings, the Commission shall, with respect to any application that is part of a plan or proposal developed under section 333(a)-(d) of this title [49 USCS § 333(a)-(d)], accord substantial weight to any re-

commendations of the Secretary of Transportation. The provisions of this subsection do not apply to any proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 et seq.]

(e) A rail carrier, or a person controlled by or affiliated with a rail carrier, together with one or more affected shippers, may apply for approval under this subsection of a transaction for the purpose of providing motor carrier transportation prior or subsequent to rail transportation to serve inadequately served shippers located on a railroad other than the applicant carriers. Such application

shall be approved by the Commission if the applicants demonstrate presently impaired rail service and inadequate motor common carrier service which results in the serious failure of the rail carrier serving the shippers to meet the rail equipment or transportation schedules of shippers or seriously to fail otherwise to provide adequate normal rail services required by shippers and which shippers would reasonably expect the rail carrier to provide. The Commission shall approve or disapprove applications under this subsection within 30 days after receipt of such application. The Commission shall approve applications which are not protested

by interested parties within 30 days following receipt of such application.

(As amended Oct. 14, 1980, P.L. 96-448, Title II, § 228(a)-(c), 94 Stat. 1931; Sept. 20, 1982, P. L. 97-261, § 21(f), (g), 96 Stat. 1123; Feb. 14, 1984, P. L. 98-216, § 2(4), 98 Stat. 5.)

Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347 (1982), provides:

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the

affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

LABOR PROTECTIVE CONDITIONS

In New York Dock Railway--Control--Brooklyn Eastern District, 360 I.C.C. 60, 84-90 (1979), the Commission set forth the following as the standard level of protection mandated by 49 U.S.C. § 11347 (1982):

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. [formerly sections 5(2) and 5(3) of the Interstate Commerce Act], except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

1. Definitions.--(a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or

dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the

railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other

arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. Notice and agreement or decision.--(a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected

by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular

case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

5. Displacement allowances.--(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by

12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall

be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and

compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. Dismissal allowances.--(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the

date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his

dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible

after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

7. Separation allowance.--A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. Fringe benefits.--No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization,

pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. Moving expenses.--Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for

all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representatives; provided, however, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the

expenses, et cetera, for any employee furloughed within three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad within 90 days after the date on which the expenses were incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. Arbitration of disputes.--(a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration

committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. Losses from home removal.--(a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective

period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against

loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter

to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under section 1 or 2 of the article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad and employees of any

other enterprises within the definition of common carrier by railroad in section 1(3) of part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish one convenient central location for each terminal or other enterprises for receipt of one such application which will be effective as to all said carriers and railroad shall notify such employees of this

requirement and of the location for receipt of the application. Such employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of the railroad who are not represented by labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 U.S.C. 11347 before February 5, 1976, and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make

such benefits applicable to transactions as defined in article I of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 U.S.C. 11347 before February 5, 1976 and under section 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

STATUTES

Section 5(2)(c) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(c) (1976), provides:

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f) (1976), provides:

(f) As a condition of its approval, under this paragraph or paragraph (3), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment except

that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Such arrangement shall contain provisions no less protective of the interests of employees than those imposed before February 5, 1976, pursuant to this subdivision and those established pursuant to section 565 of Title 45. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may be entered into after September 18, 1940, by any carrier or carriers by railroad and the duly

authorized representative or representatives of its or their employees.

Supreme Court, U.S.
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No. 91-1123

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES F. RIVES, II, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ROBERT S. BURK
General Counsel

JOHN J. MCCARTHY, JR.
Associate General Counsel

LAURENCE H. SCHECKER
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

QUESTION PRESENTED

Whether the Interstate Commerce Commission reasonably determined that employees of a railroad's motor carrier subsidiary were not entitled to labor protection benefits when they were laid off following a railroad merger.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 934 F.2d 1171. The initial decision of the Interstate Commerce Commission (Pet. App. 26a-53a) and its decision on reopening (Pet. App. 54a-78a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1991. A petition for rehearing was denied on August 20, 1991. Pet. App. 24a-25a. The petition for a writ of certiorari was filed on January 8,

1992.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATMENT

1. In 1982, the ICC gave its approval under 49 U.S.C. 11343 to the consolidation of the United Pacific Railroad Company (UP), the Missouri Pacific Railroad (MP), and the Western Pacific Railroad (WP). *Union Pac.—Control—Missouri Pac.; Western Pac.*, 366 I.C.C. 462 (1982) [*Union Pac.—Control*], aff'd *sub nom. Southern Pac. Transp. Co.* v. *ICC*, 736 F.2d 708 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985). In addition, the Commission approved UP's proposed acquisition of control of the motor carrier subsidiaries of MP and WP. The consolidated carrier continued to control the Union Pacific Motor Freight Company (UPMF), the motor carrier subsidiary of the UP. Pet. App. 2a-3a.

Under the Interstate Commerce Act, the Commission is required to provide a substantial level of protection to railroad employees who are affected by a rail carrier's involvement in a consolidation transaction requiring Commission approval. See 49 U.S.C. 11347. The protections provided by the ICC are known as the *New York Dock* conditions.[2] In the case of UP's consolidation with MP and WP, the

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[1] Petitioners filed their petition on November 15, 1991, but their appendix was rejected by the Clerk of this Court. The appendix was refiled on January 8, 1992, and the petition was docketed on that date.

[2] See *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (describing the ICC's protective conditions), aff'd *sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979); Pet. App. 91a-127a (setting forth the *New York Dock* conditions).

Commission imposed *New York Dock* conditions for the benefit of the railroad employees affected by the consolidation. *Union Pac.—Control*, 366 I.C.C. at 618-622.

2. a. More than three years after the Commission approved the UP/MP/WP consolidation, several motor carrier employees of the UPMF who had been furloughed wrote to the Commission claiming they were entitled to benefits under the *New York Dock* conditions.[3] The Commission reopened the *Union Pacific—Control* proceeding to clarify whether the motor carrier employees of UPMF were entitled to labor protection. It concluded that none of the former motor carrier employees were entitled to *New York Dock* benefits. Pet. App. 26a-53a. The Commission explained that under Section 11347 nonrailroad employees, such as the motor carrier employees in this case, are not entitled to such benefits. *Id.* at 59a-63a. The Commission relied on the language of Section 5(2)(f) of the Interstate Commerce Act (49 U.S.C. (1976)) (the predecessor of Section 11347),[4] which restricted mandatory labor protection to "railroad employees," and long-standing administrative and judi-

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[3] In addition to the petitioners in this proceeding, several other furloughed employees of UPMF claimed *New York Dock* labor protection benefits. Those employees settled with UPMF and withdrew their challenge to the ICC's order. Pet. App. 5a & n.2; see Pet. 11-14.

[4] In 1978, Congress recodified the Interstate Commerce Act. See Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337, codified at scattered sections of 49 U.S.C. 10101 *et seq.* The recodification "restate[s], without substantive change, laws enacted before May 16, 1978 * * *. Those sections may not be construed as making a substantive change in the laws replaced." Pub. L. No. 95-473, § 3(a), 92 Stat. 1466. Cf. *Norfolk & Western R.R.* v. *American Train Dispatchers*, 111 S. Ct. 1156, 1164 n.4 (1991).

cial precedent.[5] The Commission rejected the contention that *Cosby* v. *ICC*, 741 F.2d 1077 (8th Cir. 1984), cert. denied, 471 U.S. 1110 (1985), required protection for petitioners. Pet. App. 41a-51a.

b. UPMF sought reopening of the Commission's decision. By order served August 17, 1989, the Commission reopened the proceeding to permit the filing of further evidence on the issue of whether the employees were entitled to mandatory *New York Dock* labor protection conditions. The Commission also invited the employees to attempt to demonstrate that labor protection conditions should be imposed for their benefit as a matter of administrative discretion under 49 U.S.C. 11344(c).[6] Pet. App. 22a, 56a-57a.

On reopening, the Commission again determined that none of the UPMF employees were entitled to mandatory labor protection under the *New York Dock* conditions. The Commission reaffirmed that only railroad employees are entitled to such mandatory protection. Pet. App. 54a-78a. In determining which employees are railroad employees, the ICC indicated that it would adhere to a test that looks to the identity of the employer. *Id.* at 41a-43a. Under that test, petitioners, who were employed by motor carrier subsidiaries, are not railroad employees and do not receive mandatory labor protection. *Id.* at 42a. The ICC also found petitioners had submitted no evidence that would justify exercise of the

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[5] See *Pennsylvania R.R.—Merger—N.Y. Central R.R.*, 347 I.C.C. 536 (1974); *American Buslines, Inc.* v. *United States*, 253 F. Supp. 481 (D.D.C.), aff'd mem. *sub nom. Amalgamated Transit Union* v. *United States*, 385 U.S. 38 (1966).

[6] 49 U.S.C. 11344(c) states that the Commission "may impose conditions governing" a merger or consolidation transaction approved under that Section.

agency's discretion to impose labor protection conditions under 49 U.S.C. 11344(c). Pet. App. 38a, 43a.

3. Petitioners sought review of the ICC's decision in the court of appeals. The court denied the petition, holding that the Commission's conclusion that motor carrier employees are not entitled to mandatory protection under Section 11347 was a permissible one, and that petitioners had not properly presented to the ICC the issue of whether the agency should have afforded discretionary labor protection in this case. Pet. App. 1a-23a.

In reviewing the ICC's construction of Section 11347, the court of appeals applied the analysis set forth by this Court in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court said that Section 11347 does "not unambiguously express[] an intent that employees of a motor carrier subsidiary are entitled to the mandatory protections afforded in § 11347," nor does it unambiguously provide that they are not entitled to such mandatory protection. Pet. App. 9a-12a. Accordingly, the court asked whether the agency's decision to restrict mandatory labor protection under Section 11347 to employees who work for a railroad is a "permissible" one. Pet. App. 13a-14a, citing *Chevron*, 467 U.S. at 843, and *Chemical Mfrs. Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985). The court then found that the ICC's interpretation was "a permissible and rational construction of the statute." Pet. App. 15a.

The court of appeals stated that the ICC had reasonably taken into account the fact that the language of the precodification version of Section 11347 referred only to "railroad employees." Pet. App. 16a; see note 4, *supra*. The court also observed that the ICC's approach is supported by the fact that it "provides certainty and a logical limit to the scope of the

employees protected by § 11347." Pet. App. 16a. "[A] reading as expansive as that petitioners request," the court noted, "would render superfluous the ICC's use of discretionary authority * * * to give labor protection for *other* employees affected by a consolidation." *Id.* at 16a-17a.[7]

The court noted that the Eighth Circuit in *Cosby* v. *ICC*, *supra*, had found that certain motor carrier employees were entitled to labor protection in a consolidation. The court found *Cosby* unpersuasive, however, because that decision adopted an interpretation of the statute without considering whether deference to the ICC was warranted under *Chevron*. Pet. App. 13a.[8]

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[7] The court of appeals also rejected petitioners' claim that the ICC's interpretation of Section 11347 is inconsistent with the agency's "single system doctrine." Pet. App. 17a n.4. Under that doctrine, the Commission has found that the acquisition of "a single, integrated transportation system * * * made up of several separate corporations" (including motor carriers) is the acquisition of "one carrier," *Brotherhood of Ry. & Airline Clerks* v. *Burlington Northern, Inc.*, 671 F.2d 1085, 1089 (8th Cir. 1982), for purposes of determining whether the transaction is subject to the requirement of ICC approval under Section 11343(a)(4). That provision governs "acquisition of control of at least 2 carriers by a person that is not a carrier." 49 U.S.C. 11343(a)(4). The court of appeals noted that the ICC has never applied the single system doctrine to hold that employees of motor carrier subsidiaries of railroads are entitled to labor protection under Section 11347. Pet. App. 17a n.4.

[8] The court of appeals also noted that in *Kansas City Southern Indus., Inc.* v. *ICC*, 902 F.2d 423, 435 (5th Cir. 1990), the court had agreed with the ICC that certain motor carrier employees were not entitled to mandatory labor protection under Section 11347. The court pointed out that the motor carrier in *Kansas City Southern* "was not restricted to auxiliary-to-rail services and received a majority of its revenues from nonrail-related activities." Pet. App. 12a-13a.

Finally, the court of appeals found that the ICC reasonably denied discretionary labor protection to petitioners in light of the fact that "petitioners failed to present any supporting arguments at the reopening proceeding, despite being invited to do so." Pet. App. 20a. The court concluded that petitioners "had the burden to present their case to the ICC for consideration and their failure to properly present the issue of discretionary protection to the ICC precludes our review." *Id.* at 23a.

ARGUMENT

1. Petitioners contend (Pet. 32-36) that the court of appeals erred in deferring to the ICC's view that 49 U.S.C. 11347 does not provide mandatory labor protection to employees of motor carriers. That contention does not warrant this Court's review.

Section 11347 provides that when the Commission approves a consolidation transaction under Section 11343 involving a "rail carrier," it shall "require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transactions as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565)." 49 U.S.C. 11347. Prior to the 1978 recodification of the Interstate Commerce Act, the predecessor to Section 11347 used the term "railroad employees" to define the class of persons entitled to mandatory labor protection. No substantive change in meaning can be attributed to the recodification. *Train Dispatchers*, 111 S. Ct. at 1164 n.4. It follows that Section 11347 reflects a congressional intention to protect only "railroad employees," *i.e.*, those directly employed by a railroad. There is no merit in petitioners' claim (Pet. 36) that the stat-

ute unambiguously includes all employees who perform "rail work," regardless of the identity of their employer. The statute simply does not say that labor protection applies to persons engaged in work that might be thought to be characteristic of railroad employees, and it provides no guidance for applying such a nebulous standard.

If there is any ambiguity in determining which employees are covered by Section 11347, the court of appeals was correct in holding that the ICC's long-standing view, see *Pennsylvania R.R.—Merger—N.Y. Central R.R.*, 347 I.C.C. 536 (1974), that mandatory labor protection is afforded only employees of rail carriers, is a permissible one. Pet. App. 10a. As the ICC explained, the agency's bright-line test relieves the Commission (and those it regulates) of the burden of having "to examine each job performed in a non-rail subsidiary to determine whether it is the type of work that strikes us as being railroad work." *Id.* at 65a; see *id.* at 62a-63a (noting the difficulty of determining the "appropriate boundaries of 'railroad' work" that might entitle non-rail employees to mandatory labor protection and questioning "whether Congress intended such a flexible interpretation of the statute, particularly when it has supplied no guidelines for this task"). The ICC's approach also preserves room for the imposition of labor protection conditions for the benefit of non-rail employees as a matter of discretion, pursuant to 49 U.S.C. 11344(c).

In sustaining the ICC's interpretation, the court of appeals explained that the Commission's "identity of the employer" test, which limits coverage to those directly employed by railroads, "provides certainty and a logical limit to the scope of employees protected by § 11347" and avoids rendering "superfluous" the discretionary use of Section 11344. Pet. App. 16a.

In light of the reasonableness of the ICC's position, and the consistency of its approach with express statutory provisions, *Chevron* requires a court to defer to the ICC's interpretation of its governing statute. See *Pauley* v. *Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292 (1988).[9]

2. Petitioners also contend (Pet. 18-21, 29-32) that review is warranted in order to resolve a conflict between the holding in this case and the holding in *Cosby* v. *ICC*, 741 F.2d 1077 (8th Cir. 1984), cert. denied, 471 U.S. 1110 (1985). This case does not present a conflict warranting resolution by this Court. The Tenth and Fifth Circuits[10] have found

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[9] Contrary to petitioners' contention (Pet. 24-26), the court of appeals correctly found that the "single system doctrine," used by the ICC to determine that certain acquisition transactions are not covered by 49 U.S.C. 11343, has no relevance in determining whether motor carrier employees are entitled to labor protection under 49 U.S.C. 11347. Pet. App. 17a n.4. The Commission views certain corporate affiliates as a single entity for the purpose of determining that a transaction does not require ICC approval at all; that logic does not mean that when a transaction *does* require ICC approval, all employees of all corporate affiliates must be treated identically for purposes of providing labor protection. The Commission has never applied the single system doctrine to require labor protection for employees of motor carrier subsidiaries of railroads.

[10] See Pet. App. 1a-23a; *Kansas City Southern Indus., Inc.* v. *ICC*, 902 F.2d 423, 435-438 (5th Cir. 1990). Petitioners attempt to distinguish the *Kansas City Southern* decision factually (Pet. 27-28), but ignore the Fifth Circuit's direct holding there that the ICC's interpretation of Section 11347—the same interpretation confirmed by the Tenth Circuit in this case—should be sustained. 902 F.2d at 438.

that the ICC's interpretation is permissible.[11] While the Eighth Circuit's decision in *Cosby* took a different approach, that decision does not squarely conflict with this one, and the aberrant holding in *Cosby* does not impede the ICC's enforcement of the Act.

In *Cosby*, the court of appeals gave two alternative grounds for requiring the ICC to afford labor protection under Section 11347 to employees of a motor carrier subsidiary of a railroad involved in a consolidation. First, the court rejected the Commission's test of applying mandatory protection only to employees of railroad carriers, and instead held that certain motor carrier subsidiary employees should "be considered railroad employees" because their work was "intimately tied to the railroad's main transportation function." 741 F.2d at 1080-1081. Alternatively, the court assumed that the ICC had discretion to grant or deny labor protection conditions to motor carrier employees; the court then found an abuse of discretion by focusing on specific record evidence of job security assurances given to the motor carrier employees in that proceeding. *Id.* at 1081-1084.

Even if *Cosby* were applied here, it would not aid petitioners. Under the first of *Cosby*'s rationales, petitioners would not qualify for labor protection, because, as the ICC stated, they "have not demonstrated that the motor carriage performed by UPMF was limited to transportation that is auxiliary to rail

[11] The same result obtained in an early proceeding that challenged the ICC's policy. See *American Buslines, Inc.* v. *United States*, 253 F. Supp. 481, 483 (D.D.C.) ("While Section 5(2)(f) of the Act requires certain minimum financial protection over a period of four years to railroad employees, no such requirement has ever been enacted by the Congress for motor carrier employees."), aff'd mem. *sub nom. Amalgamated Transit Union* v. *United States*, 385 U.S. 38 (1966).

movements and so intimately connected to UP's main transportation system so as to transform [petitioners] into 'railroad employees,' as described in dicta in *Cosby*, 741 F.2d at 1080-81." Pet. App. 41a; see also *id.* at 64a n.5 (restating the same conclusion after reopening the proceeding). Nor are petitioners aided by the alternative rationale in *Cosby*, which, as the court itself explained, turned on unique "facts and circumstances" relating to representations by the carrier. *Cosby*, 741 F.2d at 1081. When carriers have made such representations, the Commission has extended *New York Dock* labor protection to employees. *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Ry.*, ICC Docket No. 28583 (Sub-No. 26) (Apr. 19, 1991) (1991 ICC LEXIS 88). Petitioners, however, make no claim that UP made representations that motor carrier employees would receive the benefits of mandatory labor protection.[12] See Pet. App. 45a-51a.

Quite apart from petitioners' failure to raise a square conflict with *Cosby*, the issue presented in this case is not of sufficient practical importance to warrant this Court's attention. Although petitioners correctly note (Pet. 22-24) that the ICC has in the past issued licenses for the operation of motor carriers to railroads or to rail affiliated motor carriers

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[12] Petitioners claim (Pet. 36-46) that the court of appeals erred in holding that they were precluded from challenging the ICC's denial of discretionary labor protection; the court of appeals found such preclusion because petitioners presented no evidence on that issue. That factbound claim does not merit review by this Court. In any event, the court of appeals correctly held that all of the evidence presented by petitioners went to applicability of Section 11347, and that "[n]o separate evidence or argument was directed at the availability of discretionary protection." Pet. App. 22a-23a.

that were restricted to service that was "auxiliary to or supplemental" to the railroad, see *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951), the Commission no longer issues such restricted licenses. Any such restrictions in a railroad or rail affiliate's motor carrier operating authority can be removed from a motor carrier's operating license on application. *Applications for Motor Carrier Operating Authority by Railroads & Rail Affiliates*, 132 M.C.C. 978 (1982), aff'd *sub nom. American Trucking Ass'ns* v. *ICC*, 722 F.2d 1243 (5th Cir.), cert. denied, 469 U.S. 930 (1984). Thus, the first alternative holding of *Cosby* is of limited continuing significance.

Moreover, the Commission's administration of Section 11347 has not been impeded by the *Cosby* holding. The issue in this case arises very rarely. Petitioners point to no decision in the years since *Cosby* that would have come out differently if the ICC had applied the *Cosby* test rather than the agency's test. In light of *Cosby*'s narrow precedential significance and the fact that other courts are in agreement with the Commission's interpretation of Section 11347, review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. BURK
General Counsel

JOHN J. MCCARTHY, JR.
Associate General Counsel

LAURENCE H. SCHECKER
Attorney
Interstate Commerce Commission

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